

ESTTA Tracking number: **ESTTA512715**

Filing date: **12/21/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200105
Party	Defendant Cleary Chemicals, LLC
Correspondence Address	TAMA L DRENSKI RENNER KENNER GREIVE BOBAK TAYLOR ET AL FIRST NATIONAL TOWER , FL 4 AKRON, OH 44308- 1456 UNITED STATES pto@rennerkenner.com, tldrenski@rennerkenner.com
Submission	Opposition/Response to Motion
Filer's Name	Tama L. Drenski
Filer's e-mail	pto@rennerkenner.com
Signature	/Tama L. Drenski/
Date	12/21/2012
Attachments	12-5-2012 BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON FRAUD CLAIM.pdf (6 pages)(141096 bytes) Exhibit A.pdf (6 pages)(33883 bytes) Exhibit B.pdf (5 pages)(21842 bytes) Exhibit C.pdf (3 pages)(16805 bytes) Exhibit D.pdf (1 page)(61266 bytes) Exhibit E.pdf (15 pages)(452429 bytes) Exhibit F.pdf (1 page)(10366 bytes) Exhibit G.pdf (5 pages)(1708900 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

)	In re Matter of Trademark
)	Application No. 77/942162
NOVOZYMES BIOAG, INC.)	Filed: Feb. 23, 2011
Opposer,)	
)	Opposition No. 91200105
v.)	
)	
)	
CLEARY CHEMICALS, LLC,)	
Applicant.)	
)	

**BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON
APPLICANT’S CLAIM OF FRAUD IN PROCUREMENT**

On August 3, 2012, the Board granted in part Applicant’s request for discovery pursuant to Rule 56(d). Through that discovery, Applicant, Cleary Chemicals LLC (“Cleary”) either learned and/or confirmed the following facts:

1. Merck KGaA (“Merck”) had electronically filed by its counsel the use-based application (Serial No. 77308151) that issued as Registration No. 3511124 for TORQUE, and that registration is now asserted by Opposer Novozymes Bioag Inc. (“Novozymes”) in this proceeding as the basis for opposing Cleary’s application to register TORQUE for turf and ornamental fungicides. The goods were identified as “natural molecule or bacteria for plant growth enhancement in agricultural crops.” (copy of Serial No. 77308151 is attached as Exhibit A).

2. Serial No. 77308151 was the second application filed on behalf of Merck to register TORQUE. The original application filed by Merck (Serial No. 77224388), filed electronically by Merck’s counsel on July 9, 2007, was to register TORQUE for the goods

“natural molecule or bacteria for plant growth enhancement in corn.” The original application, although filed as a use-based application, was filed without a specimen, dates of first use, or a signed declaration. An Office Action requesting a specimen, dates and appropriate declaration, went unanswered. (Exhibit B).

3. Serial No. 77308151, like the first application, was not signed by Merck or the attorney who filed the application. As in the case of the first application, an Office Action issued for Serial No. 77308151, in which Merck was advised, among other things, that the application was not signed and verified. (copy of the Office Action is attached as Exhibit C). This time Merck responded, filing a declaration on May 27, 2008 in which it declared that it was the applicant. No facts declaring that Merck’s claim of ownership was based on use by a related company were set forth in the declaration (See a copy of the Declaration filed in Response to the Office Action dated May 21, 2008, attached as Exhibit D, and Opposer’s Answers to Applicant’s First Combined Discovery Requests, attached as Exhibit E, Admission No. 20).

4. Despite no related company having been identified by Merck in its declaration, Novozymes now alleges that its predecessor-in-interest EMD Crop BioScience, Inc. (“EMD”), was the related company from which Merck’s ownership rights in TORQUE inured. (See Exhibit E, Answers to Interrogatory Nos. 1 and 12, and Answer to Request for Admission No. 21). To the extent that Novozymes now alleges that EMD was a related company through which Merck’s claim of ownership was based, Merck’s statement that it was the applicant is the second false statement made by Merck in the course of its application, the first being that it was using the 2008 specimen at least as early as the filing date of the application.

5. If this omission by Merck, i.e. the failure to identify that its claim to ownership was based upon use by a related company, was not a false statement, it is at least an omission that

renders the application void *ab initio*. As such, the absence of a statement of such facts in the declaration is the subject of the motion filed herewith by Cleary to lift the suspension of these proceedings for the purpose of allowing Cleary to amend its counterclaim for cancellation and move for summary judgment that Registration No. 3511124 is void *ab initio*, mooted these proceedings.

6. Assuming *arguendo* that EMD was the related company from which Merck's ownership rights in TORQUE inured, at the time Merck filed the second application, neither Merck nor Novozymes had ever used the mark TORQUE for an agricultural crop apart from corn. (See Exhibit E, Answer to Request for Admission No. 11; see also, Exhibit E, Answers to Requests for Admission Nos. 6, 10 and 14). Yet, Merck had abandoned its original application and filed a second use-based application to register TORQUE for the broader category of agricultural crops. The claim that the mark was in use for more than one crop is a third false statement made by Merck in the application process.

7. With reference to the Declaration of Charles Broughton, which was proffered by Novozymes in support of its motion for summary judgment on Cleary's claim for fraud, Novozymes admits that it cannot be determined from Exhibit 1 that the mark TORQUE was in use on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops" apart from corn (See Exhibit E, Answer to Request for Admission No. 6); the mark TORQUE has never been used on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops" apart from corn (See Exhibit E, Answer to Request for Admission No. 11); and Novozymes has no documents from which it can be determined that the mark TORQUE was in use on June 25, 2007 on goods meeting the description "natural molecule or bacteria for plant growth enhancement in

agriculture crops” apart from corn (See Exhibit E, Answer to Request for Admission No. 14). These admissions support a finding that Merck made a third false statement in its application.

8. Significantly, Exhibit 1 of Mr. Broughton’s declaration is the sole suitable specimen offered into evidence by Novozymes in support of its motion, and it relates to the use of TORQUE on a growth enhancement product for corn. Exhibits 2, 4 and 5, are advertisements related to the use of TORQUE on a growth enhancement product for corn. This evidence, too, supports a finding that a third false statement was made by Merck in its application.

9. Most recently, Novozymes filed a motion to amend its first date of use to October 19, 2007, the filing date of the second application to register TORQUE. (Doc. 30). This is not withstanding that Exhibit 1 to the Declaration does not show that TORQUE was used on October 19, 2007, the filing date of the second application. (Exhibit E, Answer to Request for Admission No.19). The filing of the motion to amend its first date of use to October 19, 2007 confirms a fourth false statement made by Merck in its application—the date of first use. As argued below, these facts and the reasonable inferences to be drawn from them are indirect or circumstantial evidence of a deliberate effort to obtain an earlier date of use on a broad range of the goods, despite the knowledge that Merck was not entitled to the same—raising at least a genuine issue as to deceptive intent.

LAW AND ARGUMENT

In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine issue of material fact. *Daimlerchrysler Corp. v. American Motors Corp*, 94 USPQ 2d 1086, 2010 WL 11446943 at *4 (TTAB 2010). Novozymes’ position appears to be that Mr. Broughton’s declaration eliminates any genuine issue of material fact. To the contrary, however, his declaration does not dispose of the issue, and in fact, raises additional questions of fact. (Doc. 30, p.3). Novozymes would have the Board find an absence of intent to deceive

based on mere error or inadvertence. But, Cleary's allegations are broader than that. (Doc. 18, pp. 13-14). The evidence presented by Cleary in opposition to Novozymes' motion for summary judgment on Cleary's claim for fraud presents a pattern of behavior including multiple false statements indicative of at least the existence of a genuine issue of material fact as to intent to deceive.

Because direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and circumstantial evidence. In *re Bose Corp.*, 580 F. 3d 1240, 1245 Fed.Cir. 2009). The question for the Board is whether the applicant's conduct, viewed in light of all the evidence, indicates sufficient culpability to allow a reasonable finder of fact to find intent to deceive.

While Mr. Broughton's declaration might provide a reasonable explanation as to why a false statement was made as to the specimen that was provided, it does not explain Merck's overall conduct and the other false statements involved in Merck's application that issued as the registration being asserted. Merck allowed its first application—without a signature, date of first use and specimen—to register TORQUE for use with a growth enhancement product for corn (not agricultural crops generally) to go abandoned. (See Exhibit F and Doc. 30, pp. 2-3).

Merck filed a second application—again without a signature, date of first use and specimen—in which it admittedly broadened its description of goods. (See Exhibit A and Doc. 30, p. 3). Yet, Novozymes admits that the mark was only used for corn goods. (Exhibit E, Answer to Requests for Admissions 10, 11 and 14; Answers to Interrogatory Nos. 8 and 11; see also, Doc. 30, p. 4). Further, Merck falsely represented it was the applicant. (Exhibit G and Exhibit E, Answer to Interrogatory Nos. 1, 11, 12 and 13; Answer to Request for Admission 20). Merck admittedly falsely represented the date of first use. (See Novozymes' recent filing to amend its date of first use). (Doc. 30). Based on the entirety of Merck's conduct, a reasonable

fact finder could find that Merck's multiple false statements were not mere error or inadvertence, but intentionally made to obtain an early date of use on a broader range of goods despite the knowledge that Merck was not entitled to the same.

As pointed out by Cleary in its Rule 56(d) motion, the case law cited by Novozymes in its motion for summary judgment does not support a grant of summary judgment here. Both *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 160 USPQ 715 (CCPA) and *In re Bose Corp.*, 91 USPQ 2d 1938 (Fed. Cir. 2009) cited by Novozymes were decided after testimony.

Simply stated, Mr. Broughton's declaration and the exhibits presented therein do not demonstrate that there is no genuine issue of material fact as to intent to deceive by demonstrating an honest misunderstanding or inadvertence such that no reasonable fact finder could decide the question in favor of Cleary. There being a genuine issue of material fact as to intent to deceive, Novozymes' motion for summary judgment on Cleary's claim for fraud must be denied.

Respectfully Submitted,

Dated: December 21, 2012

/Tama L. Drenski/

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Attorney for Applicant

Trademark/Service Mark Application, Principal Register

Serial Number: 77308151

Filing Date: 10/19/2007

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77308151
MARK INFORMATION	
*MARK	TORQUE
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	TORQUE
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	MERCK KGAA
*STREET	Frankfurter Strasse 250
*CITY	64293 Darmstadt
*COUNTRY	Germany
EMAIL ADDRESS	mail@ipcounselors.com
LEGAL ENTITY INFORMATION	
TYPE	partnership limited by shares
STATE/COUNTRY WHERE LEGALLY ORGANIZED	Germany
NAME OF ALL GENERAL PARTNERS, ACTIVE MEMBERS, INDIVIDUAL, TRUSTEES, OR EXECUTORS, AND CITIZENSHIP/ INCORPORATION	Dr. Karl-Ludwig Kley (a German citizen), Dr. Michael Becker (a German citizen), Dr. Bernd Reckmann (a German citizen), Mr. Elmar Schnee (a Swiss citizen), and Mr. Walter W. Zywottek (a German citizen)
GOODS AND/OR SERVICES AND BASIS INFORMATION	

* INTERNATIONAL CLASS	001
* IDENTIFICATION	Natural molecule or bacteria for plant growth enhancement in agriculture crops
FILING BASIS	SECTION 1(a)
FIRST USE IN COMMERCE DATE	At least as early as 06/25/2007
ATTORNEY INFORMATION	
NAME	William C. Wright
FIRM NAME	Epstein Drangel Bazerman & James, LLP
STREET	60 East 42nd Street, Suite 820
CITY	New York
STATE	New York
COUNTRY	United States
ZIP/POSTAL CODE	10165
PHONE	(212) 292-5390
FAX	(212) 292-5391
EMAIL ADDRESS	mail@ipcounselors.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	No
OTHER APPOINTED ATTORNEY	Jason M. Drangel, Robert L. Epstein, Harold James, and Dermot M. Sheridan
DOMESTIC REPRESENTATIVE INFORMATION	
NAME	William C. Wright
FIRM NAME	Epstein Drangel Bazerman & James, LLP
STREET	60 East 42nd Street, Suite 820
CITY	New York
STATE	New York
COUNTRY	United States
ZIP CODE	10165
PHONE	(212) 292-5390
FAX	(212) 292-5391
EMAIL ADDRESS	mail@ipcounselors.com
CORRESPONDENCE INFORMATION	

NAME	William C. Wright
FIRM NAME	Epstein Drangel Bazerman & James, LLP
STREET	60 East 42nd Street, Suite 820
CITY	New York
STATE	New York
COUNTRY	United States
ZIP/POSTAL CODE	10165
PHONE	(212) 292-5390
FAX	(212) 292-5391
EMAIL ADDRESS	mail@ipcounselors.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	No
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	325
*TOTAL FEE DUE	325
*TOTAL FEE PAID	325
SIGNATURE INFORMATION	
SIGNATURE	NOT PROVIDED
SIGNATORY'S NAME	NOT PROVIDED
SIGNATORY'S POSITION	NOT PROVIDED
DATE SIGNED	NOT PROVIDED

Trademark/Service Mark Application, Principal Register

Serial Number: 77308151

Filing Date: 10/19/2007

To the Commissioner for Trademarks:

MARK: TORQUE (Standard Characters, see [mark](#))

The literal element of the mark consists of TORQUE.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, MERCK KGAA, a partnership limited by shares legally organized under the laws of Germany, comprising of Dr. Karl-Ludwig Kley (a German citizen), Dr. Michael Becker (a German citizen), Dr. Bernd Reckmann (a German citizen), Mr. Elmar Schnee (a Swiss citizen), and Mr. Walter W. Zywoitek (a German citizen), having an address of

Frankfurter Strasse 250

64293 Darmstadt

Germany

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

International Class 001: Natural molecule or bacteria for plant growth enhancement in agriculture crops

Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, or the applicant's predecessor in interest used the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.

In International Class 001, the mark was first used at least as early as _____, and first used in commerce at least as early as 06/25/2007, and is now in use in such commerce. The applicant will submit one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, .

The applicant hereby appoints William C. Wright and Jason M. Drangel, Robert L. Epstein, Harold James, and Dermot M. Sheridan of Epstein Drangel Bazerman & James, LLP

60 East 42nd Street, Suite 820

New York, New York 10165

United States

to submit this application on behalf of the applicant.

The applicant hereby appoints William C. Wright of Epstein Drangel Bazerman & James, LLP

60 East 42nd Street, Suite 820
New York New York 10165
United States

as applicant's representative upon whom notice or process in the proceedings affecting the mark may be served.

Correspondence Information: William C. Wright

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New York, New York 10165
(212) 292-5390(phone)
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mail@ipcounselors.com (not authorized)

A fee payment in the amount of \$325 has been submitted with the application, representing payment for 1 class(es).

RAM Sale Number: 6704
RAM Accounting Date: 10/19/2007

Serial Number: 77308151
Internet Transmission Date: Fri Oct 19 09:59:53 EDT 2007
TEAS Stamp: USPTO/BAS-160.79.96.147-2007101909595365
0159-77308151-4009b1871c2659c9d2ae5d09ae
651d7449f-CC-6704-20071019094852239026

TORQUE

To: Merck KGaA (mail@ipcounselors.com)
Subject: TRADEMARK APPLICATION NO. 77224388 - TORQUE - N/A
Sent: 9/10/2007 1:38:06 PM
Sent As: ECOM114@USPTO.GOV
Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/224388

MARK: TORQUE

77224388

CORRESPONDENT ADDRESS:

WILLIAM C. WRIGHT
EPSTEIN DRANGEL BAZERMAN & JAMES,
LLP
60 E 42ND ST RM 820
NEW YORK, NY 10165-0808

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

-

APPLICANT: Merck KGaA

CORRESPONDENT'S REFERENCE/DOCKET

NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

mail@ipcounselors.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 9/10/2007

The assigned trademark examining attorney has reviewed the referenced application and has determined the following:

Search Results

The Office records have been searched and no similar registered or pending mark has been found that would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

Specimen

The application is incomplete because it does not include the required specimen showing use of the applied-for mark in commerce for the goods and/or services identified in the application. An application based on Section 1(a) of the Trademark Act must include a specimen showing the applied-for mark in use in commerce for each class of goods and/or services. Trademark Act Sections 1(a) and 45, 15 U.S.C. §§1051(a) and 1127; 37 C.F.R. §§2.34(a)(1)(iv) and 2.56; TMEP §904.

Therefore, applicant must submit the following:

(1) A specimen (i.e., an example of how applicant actually uses its mark in commerce) for each class of goods and/or services based on use in commerce.

(2) The following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: “**The specimen was in use in commerce at least as early as the filing date of the application.**” 37 C.F.R. §2.56(a); TMEP §904.09. If submitting a specimen requires an amendment to the dates of use, applicant must also verify the amended dates. 37 C.F.R. §2.71(c).

- Examples of specimens for goods are tags, labels, instruction manuals, containers, photographs that show the mark on the goods or packaging, or displays associated with the goods at their point of sale. TMEP §§904.04 *et seq.* Examples of specimens for services are signs, photographs, brochures, website printouts or advertisements that show the mark used in the sale or advertising of the services. TMEP §§1301.04 *et seq.*

- If applicant cannot satisfy the above requirements, applicant may amend the Section 1(a) filing basis (use in commerce) to Section 1(b) (intent to use basis), for which no specimen is required. However, should applicant amend the basis to Section 1(b), registration cannot be granted until applicant later amends the application back to use in commerce by filing an acceptable allegation of use with a proper specimen. 15 U.S.C. §1051(c); 37 C.F.R. §§2.76, 2.88; TMEP Chapter 1100. In the alternative, applicant may cancel the Section 1(a) basis and rely solely on the already asserted Section 44(e) basis, for which a specimen would not be required. 15 U.S.C. §1126(e); 37 C.F.R. §2.34(a)(3).

In order to amend the Section 1(a) basis to either Section 1(b) or Section 44(e) of the Trademark Act, applicant need only provide a written request to do so. TMEP §§806.02(g) and 806.03(g).

Pending a proper response, registration is refused for those goods and/or services based on Section 1(a), because applicant has not provided evidence of use in commerce of the applied-for mark. 15 U.S.C. §§1051(a) and 1127; 37 C.F.R. §§2.34(a)(1)(iv) and 2.56.

First Use Anywhere

- The application does not specify the date of first use of the mark anywhere. 15 U.S.C. §1051(a)(2); 37 C.F.R. §2.34(a)(1)(ii); TMEP §§903 and 903.01. Both a date of first use anywhere and a date of first use in commerce must be provided, even if they are the same. TMEP §903.04.

Therefore, applicant must specify the date of first use of the mark anywhere. If the date of first use anywhere differs from the date of first use in commerce, applicant must verify the date of first use anywhere with an affidavit or signed declaration under 37 C.F.R. §2.20. 37 C.F.R. §2.71(c); TMEP §903. However, if the date of first use anywhere is the same as the date of first use in commerce, applicant need not verify the date of first use anywhere. TMEP §903.05.

Declaration

- The application was not signed and verified, which are application requirements. 15 U.S.C. §§1051(a)-(b), 1126(d)-(e), 1141f(a); 37 C.F.R. §§2.33-2.34. Therefore, applicant must verify, in an affidavit or signed declaration under 37 C.F.R. §2.20, the facts set forth in the application.

If the application is based on **use in commerce** under Trademark Act Section 1(a), the verified statement must include the following allegation: **“The mark is in use in commerce and was in use in commerce on or in connection with the goods or services listed in the application as of the application filing date.”** 15 U.S.C. §1051(a)(3)(C); 37 C.F.R. §2.34(a)(1)(i); TMEP §804.02.

If the application is based on an **intent to use the mark in commerce** under Trademark Act Section 1(b) or based on a **foreign registration** under Section 44, the verified statement must include the following allegation: **“Applicant had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the application filing date.”** 15 U.S.C. §§1051(b)(3)(B), 1126(d) and (e); 37 C.F.R. §§2.34(a)(2)(i), 2.34(a)(3)(i) and 2.34(a)(4)(ii); TMEP §§804.02, 806.01(b)-(d).

Significance of Mark

- Applicant must specify whether “TORQUE” has any significance in the plant growth enhancement trade or industry, any geographical significance, or any meaning in a foreign language. 37 C.F.R. §2.61(b).

-

/Vivian Micznik First/
Vivian Micznik First
Trademark Attorney, Law Office 114
571-272-9159

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office Action should be filed using the Office’s Response to Office action form available at <http://www.uspto.gov/teas/eTEASpageD.htm>. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please

contact the assigned examining attorney.

To: Merck KGaA (mail@ipcounselors.com)
Subject: TRADEMARK APPLICATION NO. 77224388 - TORQUE - N/A
Sent: 9/10/2007 1:38:07 PM
Sent As: ECOM114@USPTO.GOV
Attachments:

IMPORTANT NOTICE
USPTO OFFICE ACTION HAS ISSUED ON 9/10/2007 FOR
APPLICATION SERIAL NO. 77224388

Please follow the instructions below to continue the prosecution of your application:

VIEW OFFICE ACTION: Click on this link
http://portal.uspto.gov/external/portal/tow?DDA=Y&serial_number=77224388&doc_type=OOA&ma
(or copy and paste this URL into the address field of your browser), or visit
<http://portal.uspto.gov/external/portal/tow> and enter the application serial number to [access](#) the
Office action.

PLEASE NOTE: The Office action may not be immediately available but will be viewable within 24 hours of this notification.

RESPONSE MAY BE REQUIRED: You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable [response time period](#). Your response deadline will be calculated from **9/10/2007**.

Do NOT hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.

HELP: For *technical* assistance in accessing the Office action, please e-mail TDR@uspto.gov. Please contact the assigned examining attorney with questions about the Office action.

WARNING

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the [ABANDONMENT](#) of your application.**

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/308151

MARK: TORQUE

77308151

CORRESPONDENT ADDRESS:

WILLIAM C. WRIGHT
EPSTEIN DRANGEL BAZERMAN & JAMES,
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60 E 42ND ST RM 820
NEW YORK, NY 10165-0808

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

-

APPLICANT: MERCK KGAA

**CORRESPONDENT'S REFERENCE/DOCKET
NO:**

N/A

CORRESPONDENT E-MAIL ADDRESS:

OFFICE ACTION

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ISSUE/MAILING DATE:

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(2) The following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: “**The specimen was in use in commerce at least as early as the filing date of the application.**” 37 C.F.R. §2.56(a); TMEP §904.09. If submitting a specimen requires an amendment to the dates of use, applicant must also verify the amended dates. 37 C.F.R. §2.71(c).

Examples of specimens for goods are tags, labels, instruction manuals, containers, photographs that show the mark on the goods or packaging, or displays associated with the goods at their point of sale. TMEP §§904.04 *et seq.* Examples of specimens for services are signs, photographs, brochures, website printouts or advertisements that show the mark used in the sale or advertising of the services. TMEP §§1301.04 *et seq.*

If applicant cannot satisfy the above requirements, applicant may amend the Section 1(a) filing basis (use in commerce) to Section 1(b) (intent to use basis), for which no specimen is required. However, should applicant amend the basis to Section 1(b), registration cannot be granted until applicant later amends the application back to use in commerce by filing an acceptable allegation of use with a proper specimen. 15 U.S.C. §1051(c); 37 C.F.R. §§2.76, 2.88; TMEP Chapter 1100. In the alternative, applicant may cancel the Section 1(a) basis and rely solely on the already asserted Section 44(e) basis, for which a specimen would not be required. 15 U.S.C. §1126(e); 37 C.F.R. §2.34(a)(3).

In order to amend the Section 1(a) basis to either Section 1(b) or Section 44(e) of the Trademark Act, applicant need only provide a written request to do so. TMEP §§806.02(g) and 806.03(g).

Pending a proper response, registration is refused for those goods and/or services based on Section 1(a), because applicant has not provided evidence of use in commerce of the applied-for mark. 15 U.S.C. §§1051(a) and 1127; 37 C.F.R. §§2.34(a)(1)(iv) and 2.56.

First Use Anywhere

The application does not specify the date of first use of the mark anywhere. 15 U.S.C. §1051(a)(2); 37 C.F.R. §2.34(a)(1)(ii); TMEP §§903 and 903.01. Both a date of first use anywhere and a date of first use in commerce must be provided, even if they are the same. TMEP §903.04.

Therefore, applicant must specify the date of first use of the mark anywhere. If the date of first use anywhere differs from the date of first use in commerce, applicant must verify the date of first use anywhere with an affidavit or signed declaration under 37 C.F.R. §2.20. 37 C.F.R. §2.71(c); TMEP §903. However, if the date of first use anywhere is the same as the date of first use in commerce, applicant need not verify the date of first use anywhere. TMEP §903.05.

Declaration

The application was not signed and verified, which are application requirements. 15 U.S.C. §§1051(a)-(b), 1126(d)-(e), 1141f(a); 37 C.F.R. §§2.33-2.34. Therefore, applicant must verify, in an affidavit or signed declaration under 37 C.F.R. §2.20, the facts set forth in the application.

If the application is based on **use in commerce** under Trademark Act Section 1(a), the verified statement must include the following allegation: “**The mark is in use in commerce and was in use in commerce on or in connection with the goods or services listed in the application as of the application filing date.**” 15 U.S.C. §1051(a)(3)(C); 37 C.F.R. §2.34(a)(1)(i); TMEP §804.02.

If the application is based on an **intent to use the mark in commerce** under Trademark Act Section 1(b) or based on a **foreign registration** under Section 44, the verified statement must include the following allegation: **“Applicant had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the application filing date.”** 15 U.S.C. §§1051(b)(3)(B), 1126(d) and (e); 37 C.F.R. §§2.34(a)(2)(i), 2.34(a)(3)(i) and 2.34(a)(4)(ii); TMEP §§804.02, 806.01(b)-(d).

Significance of Mark

Applicant must specify whether “TORQUE” has any significance in the plant growth enhancement trade or industry, any geographical significance, or any meaning in a foreign language. 37 C.F.R. §2.61(b).

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Chrisie Brightmire King/
Trademark Attorney
Law Office 109
(571) 272-9179
chrisie.king@uspto.gov

RESPOND TO THIS ACTION: If there are any questions about the Office action, please contact the assigned examining attorney. A response to this Office action should be filed using the form available at <http://www.uspto.gov/teas/eTEASpageD.htm>. If notification of this Office action was received via e-mail, no response using this form may be filed for 72 hours after receipt of the notification. **Do not attempt to respond by e-mail as the USPTO does not accept e-mailed responses.**

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Merck KGaA

Mark: TORQUE

Ser. No.: 77/308,151

Dated: October 19, 2007

DECLARATION

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements may jeopardize the validity of the Declaration or any resulting registration, declares that: he/she is properly authorized to execute this form on behalf of the applicant; he/she believes the applicant to be the owner of the trademark sought to be registered; the applied for mark is in use in commerce and was in use in commerce on or in connection with the goods listed in the application at least as early as the application filing date; the applied for mark was first used anywhere on June 25, 2007; the enclosed specimens are in use in commerce and have been in use in commerce on or in connection with the goods listed in the application since at least as early as the application filing date; the facts set forth in the application are true and correct; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Dated: May 21, 2008

MERCK KGAA

BY:

i.v.

Print Name: Helge Erkelenz

Title:

Authorised Representative

MERCK KGAA

Dated: May 21, 2008

BY:

i.v.

Print Name:

Title:

Jonas Kölle

Authorised Representative

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NOVOZYMES BIOAG, INC.,)	
)	
Opposer,)	Opposition No. 91200105
)	
v.)	
)	
CLEARY CHEMICALS, LLC,)	
)	
Applicant.)	

**ANSWERS TO APPLICANT'S FIRST SET OF COMBINED DISCOVERY
REQUESTS**

Now comes Opposer, Novozymes BioAg, Inc., and in answer to
Applicant's Discovery Requests, states as follows:

Request for Admission No. 1.

Admit that the Declaration of Charles Broughton does not state that the mark
TORQUE was in use on June 25, 2007.

Answer to Request for Admission No. 1:

Admit.

Request for Admission No. 2.

Admit that the Declaration of Charles Broughton does not state that Exhibit 1 to
his Declaration was in use on June 25, 2007.

Answer to Request for Admission No. 2:

Admit.

Request for Admission No. 3.

Admit that it cannot be determined from Exhibit 1 to the Declaration of Charles Broughton that the mark TORQUE was in use on June 25, 2007.

Answer to Request for Admission. 3:

Admit.

Request for Admission No. 4.

Admit that it cannot be determined from Exhibit 1 to the Declaration of Charles Broughton that the mark TORQUE was in use on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops."

Answer to Request for Admission No. 4:

Admit.

Request for Admission No. 5.

Admit that it cannot be determined from Exhibit 2 to the Declaration of Charles Broughton that the mark TORQUE was in use on June 25, 2007.

Answer to Request for Admission No. 5:

Admit.

Request for Admission No. 6.

Admit that it cannot be determined from Exhibit 2 to the Declaration of Charles Broughton that the mark TORQUE was in use on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops," apart from corn.

Answer to Request for Admission No. 6:

Admit.

Request for Admission No. 7.

Admit that it cannot be determined from Exhibit 3 to the Declaration of Charles Broughton that the mark TORQUE was in use on June 25, 2007.

Answer to Request for Admission No. 7:

Admit.

Request for Admission No. 8.

Admit that it cannot be determined from Exhibit 4 to the Declaration of Charles Broughton that the mark TORQUE was in use on June 25, 2007.

Answer to Request for Admission No. 8:

Admit.

Request for Admission No. 9.

Admit that it cannot be determined from Exhibit 5 to the Declaration of Charles Broughton that the mark TORQUE was in use on June 25, 2007.

Answer to Request for Admission No. 9:

Admit.

Request for Admission No. 10.

Admit that it cannot be determined from Exhibit 5 to the Declaration of Charles Broughton that the mark TORQUE was in use on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops," apart from corn.

Answer to Request for Admission No. 10:

Admit.

Request for Admission No. 11.

Admit that the mark TORQUE has never been used on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops" apart from corn.

Answer to Request for Admission No. 11:

Admit.

Request for Admission No. 12.

Admit that it cannot be determined from Exhibit 6 to the Declaration of Charles Broughton that the mark TORQUE mark was in use on June 25, 2007.

Answer to Request for Admission No. 12:

Admit.

Request for Admission No. 13.

Admit that Novozymes has no documents from which it can be determined that the mark TORQUE was in use on June 25, 2007.

Answer to Request for Admission, 13:

Deny.

Request for Production of Documents No. 1.

If the response to Request for Admission No. 13 is anything but an unqualified admission, produce all documents from which it can be determined that the mark TORQUE was in use on June 25, 2007.

Answer to Request for Production of Documents No. 1:

The documents will be produced.

Request for Admission No. 14.

Admit that Novozymes has no documents from which it can be determined that the mark TORQUE was in use on June 25, 2007 on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops," apart from corn.

Answer to Request for Admission No. 14:

Admit.

Request for Production of Documents No. 2.

If the response to Request for Admission No. 14 is anything but an unqualified admission, produce all documents from which it can be determined that the mark TORQUE was in use on June 25, 2007 on goods meeting the description "natural molecule or bacteria for plant growth enhancement in agriculture crops," apart from corn.

Answer to Request for Production of Documents No. 2:

None.

Interrogatory No. 1.

State the nature of the affiliation between EMD Crop Bioscience Inc. and Merck KGAA on June 25, 2007.

Answer to Interrogatory No. 1:

Related company.

Request for Admission No. 15.

Admit that at the time they signed the Declaration dated May 21, 2008, neither Erkelenz nor Kölle had personal knowledge of the use of the mark TORQUE in U.S. commerce.

Answer to Request for Admission No. 15:

Opposer does not know whether Erkelenz or Kolle had personal knowledge of the use of the mark TORQUE in U.S. commerce. However, on information and belief, this admission is denied.

Interrogatory No. 2.

If the response to Request for Admission No. 15 is anything but an unqualified admission, state the factual basis for your contention that either Erkelenz or Kölle had personal knowledge of the use of the mark TORQUE in commerce.

Answer to Interrogatory No. 2:

On information and belief, on or about October 17, 2007, Jody Sharp, a paralegal at EMD Chemicals in New York, sent Helge Erkelenz a Torque sell sheet. On information and belief, Ms. Sharp also sent Mr. Erkelenz a Torque specimen label on February 28, 2008. To the extent that receipt of these documents can be considered "personal knowledge," the admission is denied.

Request for Production of Documents No. 3.

If the response to Request for Admission No. 15 is anything but an unqualified admission, produce all documents from which it can be determined that either Erkelenz or Kölle had personal knowledge of the use of the mark TORQUE in commerce.

Answer to Request for Production of Documents No. 3:

The document will be produced.

Interrogatory No. 3.

State who authorized William C. Wright to file the application to register the mark TORQUE.

Answer to Interrogatory No. 3:

Helge Erkelenz.

Request for Production of Documents No. 4.

Produce copies of all specimens provided to William C. Wright at the time of the filing of the application to register the mark TORQUE.

Answer to Request for Production of Documents No. 4:

Opposer is without knowledge or information as to any documents provided to Mr. Wright at the time of filing of the application, but on information and belief, none.

Interrogatory No. 4.

Identify the person(s) who authorized Erkelenz and Kölle to execute the Declaration dated May 21, 2008.

Answer to Interrogatory No. 4:

On information and belief, Merck. Helge Erkelenz is a Trademark attorney for Merck and Kölle was his supervisor. Merck mandates that all documents have to be signed by two people.

Interrogatory No. 5.

State how Erkelenz and Kölle came into possession of the specimen attached to their Declaration dated May 21, 2008.

Answer to Interrogatory No. 5:

On information and belief, the specimen was provided by Jody Sharp, a former employee of EMD Chemicals, as an attachment to an email.

Interrogatory No. 6.

State the nature of the specimen attached to the Declaration of Erkelenz and Kölle dated May 21, 2008.

Answer to Interrogatory No. 6:

The specimen attached to the declaration is a 2008 specimen label identical to the 2007 specimen label created on September 22, 2007. This latter label is identical to the LCO-C IF specimen label initially adopted and used in February of 2007 except that the mark TORQUE has been substituted for the name LCO-C IF.

Interrogatory No. 7.

State "why" the application to register the mark TORQUE was filed by Merck KGAA and not EMD Crop Bioscience, Inc.

Answer to Interrogatory. 7:

Upon information and belief, Merck generally applies for and owns all trademarks of its subsidiaries. Other than this belief, opposer has no knowledge of why Merck applies for trademarks in its own name.

Interrogatory No. 8.

State whether the product identified in the description of the goods in U.S. Application Serial No. 77/942162 was sold in U.S. commerce by EMD Crop Bioscience, Inc. prior to June 25, 2007.

Answer to Interrogatory No. 8:

Yes.

Interrogatory No. 9.

If the product identified in the description of the goods was sold in U.S. commerce by EMD Crop Bioscience, Inc. prior to June 25, 2007, identify the name or names under which it was sold.

Answer to Interrogatory No. 9:

LCO-C IF.

Interrogatory No. 10.

State whether the product identified in the description of the goods of U.S. Registration No. 3,511,124 was sold in U.S. commerce by Merck KGAA prior to June 25, 2007.

Answer to Interrogatory No. 10:

Yes.

Interrogatory No. 11.

If the product identified in the description of the goods of U.S. Registration No. 3,511,124 was sold in U.S. commerce by Merck KGAA prior to June 15, 2007, identify the name or names under which it was sold.

Answer to Interrogatory No. 11:

The product identified in the description of goods of U.S. Reg. 3,511,124 was sold prior to June 25, 2007, by Merck's related company, EMD, under the name LCO-C IF.

Request for Admission No. 16.

Admit that Merck KGAA filed an extension of time in which to file this Opposition on January 31, 2011.

Answer to Request for Admission No. 16:

Admit.

Request for Admission No. 17.

Admit that Merck KGAA assigned its entire interest and the goodwill in the mark TORQUE to EMD Crop BioScience Inc. on February 7, 2011.

Answer to Request for Admission No. 17:

Admit.

Request for Admission No. 18.

Admit that EMD Crop BioScience Inc. filed this Opposition on June 2, 2011.

Answer to Request for Admission No. 18:

Admit.

Request for Admission No. 19.

Admit that the Declaration of Charles Broughton does not state that Exhibit 1 to his Declaration was in use in commerce on or in connection with the goods listed in the registration at least as early as the application filing date.

Answer to Request for Admission No. 19:

Admit.

Request for Admission No. 20.

Admit that the Declaration dated May 21, 2008 does not state that the first use of the mark was by a predecessor in interest or a related company.

Answer to Request for Admission No. 20:

Admit.

Request for Admission No. 21.

Admit that Merck KGAA itself was not using the mark in U.S. commerce on the application filing date.

Answer to Request for Admission No. 21:

Opposer can neither admit nor deny this request because the request is vague. As indicated in response to Interrogatory No. 11, it is not known what is meant by Merck KGAA "itself." Merck, through its related company EMD Crop Bioscience, was using the mark TORQUE in U.S. commerce before the filing date.

Interrogatory No. 12.

State the nature of the affiliation between EMD Crop Bioscience Inc. and Merck KGAA on October 19, 2007.

Answer to Interrogatory No. 12:

Related company.

Interrogatory No. 13.

State the nature of the affiliation between EMD Crop Bioscience Inc. and Merck KGAA on January 31, 2011.

Answer to Interrogatory No. 13:

Related company.

Request for Production No. 5.

Provide your earliest dated catalog illustrating the use of the mark TORQUE in U.S. commerce.

Answer to Request for Production No. 5:

None, but see the sell sheet produced in response to Document Request No. 3 to the extent that this one page document is equivalent to a catalog.

Request for Production of Documents No. 6.

Provide your earliest dated webpage illustrating the use of the mark TORQUE in U.S. commerce.

Answer to Request for Production of Documents No. 6:

On information and belief, the specimen label was posted on EMD's website in 2007, but opposer has no copy of this web page. Opposer's current specimen label and other Torque materials are posted on its web page and are changed when updated. These documents will be produced as the "earliest dated web page" on hand.

Request for Production of Documents No. 7:

Provide documentation evidencing your earliest offer for sale of product under the TORQUE mark in U.S. commerce.

Answer to Request for Production of Documents No. 7:

The documents will be produced.

Request for Production No. 8.

Provide documentation evidencing your first sale of product under the TORQUE mark in U.S. commerce.

Answer to Request for Production No. 8:

The document will be produced.

Respectfully submitted,

NOVOZYMES BIOAG, INC.

By: 

Charles Broughton

As to Objections,

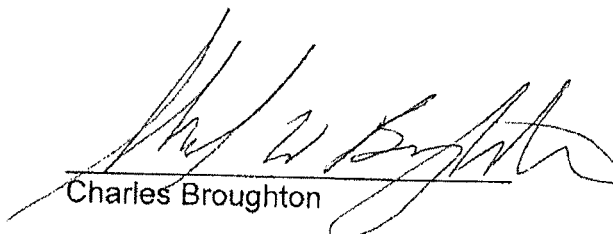


Edward M. Prince
Alston & Bird LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004

Dated: October 19, 2012

Declaration of Charles Broughton

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of the registration, declares that he is currently Director, Global Business Development of Novozymes BioAg Inc., formerly EMD Crop Bioscience Inc.; that he was employed by EMD Crop Bioscience Inc. in 2007 as Director, Marketing; that he has read the foregoing response; that he has personal knowledge of the truth of some of the answers; and that, in the remaining instances, he has been informed that the answers are true, and on the basis of that information and belief, believes them to be true.



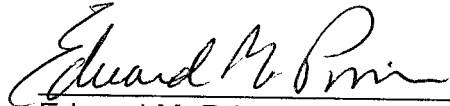
Charles Broughton

Dated: October 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2012, a true and correct copy of the foregoing Answers to Applicant's First Set of Combined Discovery Requests was served by U.S. mail and email on Applicant by serving Applicant's counsel addressed as follows:

Tama L. Drenski
Renner, Kenner, Greive, Bobak, Taylor & Weber
Fourth Floor, First National Tower
Akron, Ohio 44308-1456
Email: tldrenski@rennerkenner.com



Edward M. Prince

Side - 1

NOTICE OF ABANDONMENT
MAILING DATE: Apr 7, 2008

The trademark application identified below was abandoned in full because a response to the Office Action mailed on Sep 10, 2007 was not received within the 6-month response period.

If the delay in filing a response was unintentional, you may file a petition to revive the application with a fee. If the abandonment of this application was due to USPTO error, you may file a request for reinstatement. Please note that a petition to revive or request for reinstatement **must be received within two months from the mailing date of this notice.**

For additional information, go to <http://www.uspto.gov/teas/petinfo.htm>. If you are unable to get the information you need from the website, call the Trademark Assistance Center at 1-800-786-9199.

SERIAL NUMBER: 77224388

MARK: TORQUE

OWNER: Merck KGaA

Side - 2

UNITED STATES PATENT AND TRADEMARK OFFICE
COMMISSIONER FOR TRADEMARKS
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451

FIRST-CLASS
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WILLIAM C. WRIGHT
EPSTEIN DRANGEL BAZERMAN & JAMES, LLP
60 E 42ND ST RM 820
NEW YORK, NY 10165-0808

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77308151
LAW OFFICE ASSIGNED	LAW OFFICE 109
MARK SECTION (no change)	
ARGUMENT(S)	
<p>i. Applicant, by its undersigned attorney, encloses a specimen of use and a Declaration in support thereof.</p> <p>ii. Upon information and belief, the applied for mark, other than as a trademark, has no meaning in the trade/industry or as applied to the goods. Moreover, upon information and belief, the applied for mark has no meaning in a foreign language or geographical significance.</p>	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_1607996147-131115190_.Torque_speclabel.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT\IMAGEOUT\773\081\77308151\xml1\ROA0002.JPG
ORIGINAL PDF FILE	evi_1607996147-131115190_.torque.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT\IMAGEOUT\773\081\77308151\xml1\ROA0003.JPG
SIGNATURE SECTION	
RESPONSE SIGNATURE	/William C. Wright/
SIGNATORY'S NAME	William C. Wright
SIGNATORY'S POSITION	Attorney for Applicant
DATE SIGNED	05/27/2008
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	

SUBMIT DATE	Tue May 27 13:16:41 EDT 2008
TEAS STAMP	USPTO/ROA-160.79.96.147-2 0080527131641266053-77308 151-420c991c0b1b3f97c4e62 538c4c808bc4ec-N/A-N/A-20 080527131115190540

PTO Form 1957 (Rev 9/2005)
OMB No. 0651-0050 (Exp. 04/2009)

Response to Office Action To the Commissioner for Trademarks:

Application serial no. **77308151** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

- i. Applicant, by its undersigned attorney, encloses a specimen of use and a Declaration in support thereof.
- ii. Upon information and belief, the applied for mark, other than as a trademark, has no meaning in the trade/industry or as applied to the goods. Moreover, upon information and belief, the applied for mark has no meaning in a foreign language or geographical significance.

EVIDENCE

Original PDF file:

[evi_1607996147-131115190_.Torque_speclabel.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

Original PDF file:

[evi_1607996147-131115190_.torque.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

SIGNATURE(S)

Response Signature

Signature: /William C. Wright/ Date: 05/27/2008

Signatory's Name: William C. Wright

Signatory's Position: Attorney for Applicant

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 77308151

Internet Transmission Date: Tue May 27 13:16:41 EDT 2008

TEAS Stamp: USPTO/ROA-160.79.96.147-2008052713164126

6053-77308151-420c991c0b1b3f97c4e62538c4

c808bc4ec-N/A-N/A-20080527131115190540

Net Contents: 2 x 2.5 gallon (9.5 L)
Net weight: 41.7 lbs (18.9 kg)



CAUTION

- SHAKE WELL BEFORE USE.
- USE BEFORE EXPIRATION DATE.
- USE WITHIN FIVE DAYS OF OPENING PACKAGE.
- STORE IN COOL, DRY PLACE OUT OF SUNLIGHT.

PRODUCT NO: 8300

NOT A PLANT FOOD PRODUCT

COMPATIBILITY

- MIX AND APPLY WITH SEED IN-FURROW COMPATIBLE PRODUCTS ONLY.
- Perform jar test prior to tank mixing products to ensure compatibility.
- For product compatibility questions, contact EMD Crop BioScience R & D at 1.800.558.1003.

ACTIVE INGREDIENT

Product contains a minimum of $1 \times 10^{-7}\%$ lipo-chitooligosaccharide for corn.

OTHER INGREDIENTS

Aqueous carrier > 99%

APPLICATION RATE / UNIT TREATS		
Inches/row	Application rate	Acres treated
15	1.5 pt/A	13
20-22	1.25 pt/A	16
30	1.0 pt/A	20

DIRECTIONS FOR APPLICATION

- Apply product into the seed furrow. Use only with seed in-furrow safe products.
- Clean tank before use.
- Shake product well.
- Add other products into tank in recommended order of addition before adding *Torque IF*.
- For rapid dispensing, hold the *Torque IF* package over the spray tank and cut the corner of the bag.
- *Torque IF* does not require agitation to remain in suspension.
- If planting is delayed, keep diluted tank mix out of direct sunlight. Do not allow the diluted tank mix to exceed 100° F.
- Once mixed, use within 24 hours.

LIMITED WARRANTY

EMD Crop BioScience Inc. (or EMD Crop BioScience Canada Inc., dependent on which entity is the seller of this product) (the seller of this product is referred to herein as "EMD") guarantees this product conforms to its label description and is suitable for its intended use if stored and used strictly in accordance with label directions under normal conditions of use. EMD, through its distributors, must be notified of any field performance complaint within seventy (70) days after planting. EMD's sole obligation under this warranty shall be to refund the purchase price. EMD SHALL NOT BE LIABLE FOR AND DISCLAIMS ALL CONSEQUENTIAL, INCIDENTAL AND CONTINGENT DAMAGES WHATSOEVER. Without limiting the foregoing, EMD shall not be responsible for loss or partial loss of crop from any cause whatsoever. EMD SHALL NOT BE SUBJECT TO ANY OTHER OBLIGATIONS OR LIABILITIES, WHETHER ARISING OUT OF BREACH OF CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY) OR OTHER THEORIES OF LAW. THIS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, AND SELLER EXPRESSLY DISCLAIMS AND EXCLUDES ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE. THE ABOVE LIMITED WARRANTY IS VOID WHERE PROHIBITED BY LAW.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

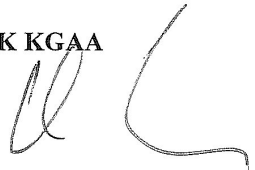
Applicant: Merck KGaA
Mark: TORQUE
Ser. No.: 77/308,151
Dated: October 19, 2007

DECLARATION

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements may jeopardize the validity of the Declaration or any resulting registration, declares that: he/she is properly authorized to execute this form on behalf of the applicant; he/she believes the applicant to be the owner of the trademark sought to be registered; the applied for mark is in use in commerce and was in use in commerce on or in connection with the goods listed in the application at least as early as the application filing date; the applied for mark was first used anywhere on June 25, 2007; the enclosed specimens are in use in commerce and have been in use in commerce on or in connection with the goods listed in the application since at least as early as the application filing date; the facts set forth in the application are true and correct; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

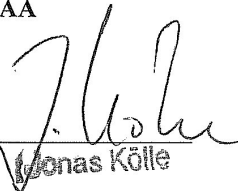
Dated: May 21, 2008

MERCK KGAA

BY: 
Print Name: Helge Erkelenz
Title: Authorised Representative

Dated: May 21, 2008

MERCK KGAA

BY: 
Print Name: Jonas Kölle
Title: Authorised Representative